Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

KHANG MARTIN,

Petitioner,

V.

BMW MANUFACTURING CORP.,

Respondent.

Petition For Writ Of Certiorari From The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

Khang Martin
5675 Roswell Road 28C
Atlanta, Ga 30342
(404) 303 - 8757

28 pp

QUESTIONS PRESENTED

1. Under the time period for filing a charge of discrimination with the EEOC, a claimant has 300 days when cross filing with the state agency. Does the 300-day period start when an employer has made a discriminatory decision? Or when the actual decision is enforced in the workplace?

2. Can a plaintiff recover under Title VII of Civil Rights Act of 1964, 42 U. S. C. 2000e et seq., for unlawful employment practices that are outside the statutory charge-filing period, if the practices are "sufficiently related" to unlawful practices that occurred within the period?

3. A claimant files a timely retaliatory charge with the EEOC and South Carolina Department of Wage and Child Labor. The South Carolina Department of Wage and Child Labor completed an investigation but erred on the oversight for unpaid earned wages owed. Are there any remedies for a claimant to recover these wages?

PARTIES TO THE PROCEEDING

George A. Harper, #1728
2100 Landmark Building
301 N. Main Street
Greenville, SC 29601-2122
(864) 232- 7000

and

Robert M. Sneed, #7487
2100 Landmark Building
301 N. Main Street
Greenville, SC 29601-2122
(864) 232- 7000
Counsel for Respondent, BMW Manufacturing Corporation

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STATEMENT OF JURISDICTION

The opinion for the United States Court of Appeals for Fourth Circuit, not designated for publication, appears as Appendix A to this petition. A time extension motion was filed for a petition of rehearing on November 27 and denied on the same day that is Appendix B. A Motion for Rehearing and Rehearing En Banc were filed and denied on December 10 that is found at Appendix C. The opinion for the United States District Court for the District of South Carolina Greenville Division, not designated for publication, appears as Appendix D. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1) in which "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF THE CASE

From February 1995 until November 1996, Mr. Martin worked as a temporary employee within the Paintshop Maintenance group at BMW Manufacturing Corporation. BMW hired Mr. Martin, an African-American male, in December 1996 as a Team Assistant within Cost Center 1785, the Paintshop ESA group.

In February 1998, Mr. Bartow, Paintshop Manager, promoted Mr. Martin to Staff within Cost Center 1785 via a Job Opportunity System posting. Upon accepting the staff position in Cost Center 1785, Mr. Martin was continuously "double-

managed" by Mr. Scott Jones, B-shift Coordinator for Cost Center 1785, and Mr. Steve Sarratt, A-shift ESA Staff member. Mr. Martin remained in the staff position until April 12, 2000. During this period at BMW, there were no other salaried associates being managed by a peer and a supervisor. Mr. Martin's ideas were constantly questioned as well as key projects completed twice by Mr. Martin and another associate simultaneously due to lack of confidence expressed by Mr. Scott Jones and Mr. Sarratt.

At the beginning of June 1999, Mr. Hjalmar Hengstmann, Paintshop IT Coordinator, transferred to another position outside the Paintshop leaving his former position available. The position was never posted via the Job Opportunity System but filled internally. Mr. Martin was advised by Mr. Hengstmann on May 25th to verbally inquire on the position with Mr. Dara Leadford, Lead Coordinator and hiring supervisor for immediate consideration. On June 6, 1999, Mr. Martin received a phone message from Mr. Leadford stating the position responsibilities would change therefore downgrading the position to staff level. Mr. Leadford also stated the position would be filled by Mr. Robert Sincavage, current B-shift staff in the Paintshop as he was "better fit." Mr. Martin sent three mails inquiring as to the reasoning along with the educational and technical qualifications needed for the position to Mr. Leadford and Mr. Mark Poindexter, an African-American Human Resource Coordinator but to no avail.

Previously in February 1999, BMW created a new policy that stated in order to be promoted to positions in management, the associate must meet the educational and work experience requirements designated. For Mr. Hengstmann's former coordinator position, an associate would have a four-year college degree along with five years work experience in Information Technology. Mr. Martin had the all the credentials where as Mr. Sincavage had none at that particular time. (Lodging, p.17) Mr. Sincavage started the position in the middle of June 1999.

Mr. Martin was denied outside training on engineering and computer system topics by Mr. Scott Jones during period including May 1999 until April 2000 citing it was not important for his job function. However, Mr. Mike Smith a white staff member was allowed to attend Windows NT Administration training and other courses.

In August 1999, Mr. Martin immediately admitted to an unprofessional act within the workplace. This act was the only below standard blemish on his employment record. However, Mr. Martin was accused of poor communication and work ethic from the period June 1999 – April 2000.

From August 1999 until April 2000, Mr. Martin continuously worked in a hostile environment initiated by Paintshop management in retaliation against him for his involvement in an unprofessional act.

On September 28,1999, Mr. Martin attended a restructuring meeting for Cost Center 1785 headed by Mr. Doug Bartow and Mr. Steve Jones, Lead Coordinator of Engineering and Maintenance for Paintshop. A decision was made that Mr. Kevin Latham; B-shift staff member within Cost Center 1785 would transfer to A-shift. Mr. Martin along with Coordinator Mr. Scott Jones was to remain as management personnel within Cost Center 1785 for B-shift. Mr. Martin asked Mr. Bartow what were measures could be utilized in transferring to A-shift i.e. Mr. Sammy Rice's position within the cost center. Mr. Bartow's response was that Mr. Martin would have to apply through the Job Opportunity System for the position. (Lodging, p. 17) However, it was in stark contrast to previous B-shift to A-shift moves by Mr. Steve Sarrat and Mr. Craig Barnwell who were both white and did not apply when the A-shift position was available.

On September 29, 1999, Mr. Martin submitted an email addressing concerns and questions from the previous days meeting.

On September 30, 1999, Mr. Bartow and Mr. Martin engaged in a closed-door meeting to address the email. Mr. Bartow verbally threatened Mr. Martin for sending the email. Mr. Bartow went onto state if continued questions persisted, it would lead to a shortened career at BMW. Mr. Martin's emailed questions were never answered.

In December 1999, Mr. Sarratt accused Mr. Martin for taking system privileges away from himself and ESA associate, Mr. Huynh Phan. Mr. Sarratt changed Mr. Martin's system privileges and password. In a meeting involving Mr. Sarratt, Mr. Mike Robinson, Mr. Scott Jones and Mr. Martin, Mr. Martin stated that he did not tamper with their respective accounts and offered an observation that software has an error.

On another occasion, Mr. Sarratt accused Mr. Martin of corrupting the software due to the fact Mr. Martin checked Mr. Sarratt's actions as new system administrator and made a change to the Alarm Configuration section of the software.

On January 5, 2000, Mr. Sarratt accused Mr. Martin of sabotaging the system during the Christmas shutdown. Mr. Sarratt did not load the system backup properly to correct the problem that occurred on the Facilities Monitoring Computer System.

On January 27, 2000, Mr. Martin was involved in a suspension meeting with Mr. Mark Poindexter, Mr. Bartow and Mr. Steve Jones on the basis of sabotage to the Facilities Monitoring Computer System and responsive emails to Mr. Steve Sarratt. Mr. Martin stated through a detailed explanation that there was a software problem within the system but his explanation was ignored. The suspension was immediate pending an investigation by Mr. Poindexter.

On February 1, 2000, Mr. Martin was involved in an employment reinstatement meeting with Mr. Poindexter, Mr.

Bartow and Mr. Jones. Mr. Poindexter stated Mr. Martin had his employment reinstated. Mr. Poindexter handed a document to sign and hurried him to sign it in lieu of reading the document in its entirety. Mr. Poindexter informed Mr. Martin of a Cost Center 1785 management meeting the following morning. Mr. Poindexter did not inform the actions surrounding a third level corrective action.

On February 2, 2000, Mr. Martin was involved in a meeting with Mr. Poindexter, Mr. Bartow, Mr. Steve Jones, Mr. Scott Jones, Mr. Steve Sarratt and Mr. Mike Robinson to discuss the failures of communications within Cost Center 1785 as it pertained to the previous suspension. Mr. Bartow made Mr. Martin the scapegoat for miscommunication within the management team of Cost Center 1785.

On February 7, 2000, Mr. Martin submitted an email to Mr. Poindexter requesting a meeting to discuss his investigative report along with all findings around the system sabotage. Mr. Poindexter did not respond. Mr. Martin immediately moved to Mr. Larry Staton, Human Resource Manager for a response and was promised an answer within five business days but to no avail. Mr. Martin resubmitted the request to Mr. Poindexter on April 10, 2000 and received a response to a meeting set for April 14, 2000 but was terminated on April 12, 2000.

During his tenure as staff in Cost Center 1785, Mr. Martin was never allowed to exercise a management role over the B-Shift Equipment Service Associates when Mr. Scott

Jones, Coordinator, was out for vacation or illness. Instead, all white staff members and Mr. Mike Robinson, A-Shift Coordinator, within this cost center would manage the B-shift in Mr. Jones' absence.

Mr. Martin was consistently harassed via emails and verbally from February 2000 until termination by Mr. Sarratt on Facilities Monitoring Computer System stability. Mr. Scott Jones denied the generation for new projects during this period. Mr. Martin was unable to receive assistance from Mr. Poindexter and Ms. Callahan, Human Resource Coordinators on investigation report results from January 2000 suspension, unexplained seizing of vacation days, wage shortages and safety shoe reimbursement.

Mr. Martin conducted himself professionally in the year 2000 and completed all assigned tasks by Mr. Scott Jones to the letter. Mr. Jones attacked Mr. Martin personally in his yearly review in April 2000.

On April 17, 2000, Mr. Martin filed a complaint with EEOC and South Carolina Human Affairs Commission citing BMW for unlawful employment acts of discrimination based on his race.

On April 26, 2000, Mr. Martin was given a biased management review due to the fact he filed an EEOC complaint and all pertinent information was not submitted by Human Resource Department.

On May 18, 2000, Mr. Martin filed a retaliation charge against BMW for failure to timely pay earned wages in accordance to the company and state policies.

In November 2000, South Carolina Department of Wage and Child Labor Commission cited BMW for improper timely wage payment to Mr. Martin in case 37-87-01. At this time not all earned wages and reimbursements have been received.

ARGUMENT

Mr. Martin asserts in this case that BMW Manufacturing Corp. continuously committed unlawful employment acts of overt and covert discrimination, retaliation and creation of a hostile work environment against him on the basis of race during his employment period. Support for this position comes directly from the Civil Rights Act of 1964. Section 706(e) states that a potential plaintiff shall file any charge with the EEOC within 180 or 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e – 5(e). When an unlawful employment practice continues into the charge-filing period, the plaintiff may seek redress for that violation, without regard to when the plaintiff knew or should have known of the practice.

Mr. Martin's discrimination claim for promotion denial in June 1999 was noted as time barred on the basis the action took place outside the 300-day period in which the initial action

for several reasons. Mr. Martin's initial assumption was based on an educated speculation but was proven with supporting memorandum thru initial discovery that occurred in December 2000.

Utilizing the plain language established thru Job Function Data Sheet, BMW asserts that all salaried positions must have in order to specify respective primary functions (Lodging, p.5) The only difference between Mr. Hengstmann's JFDS and Mr. Sincavage's JFDS is the education and work experience requirement. (Lodging, pp.6-9) Mr. Martin had all qualifications to fulfill the position requirements from the BS degree in Computer Information Systems to eight years professional experience prior to BMW and in his current position. (Lodging, pp.10-11, 16) The position was given to an under qualified white staff member. (Lodging, pp.14-15) Due to the denial for the promotion, Mr. Martin, an African-American was unable to gain a $12, 000 base salary increase along with the most substantial benefits being a free company car and A-shift working hours for becoming a Coordinator replacing Mr. Hengstmann as opposed to his current level of B-shift staff. The prima facie case has been concretely established and satisfied in regards to McDonnell Douglas, 411 U.S. at 802; (1973) BMW moved Mr. Sincavage into the downgraded staff position in the middle of June 1999. He was officially acknowledged into the position by signing the JFDS on August 7, 2000. (Lodging, p.15) This unlawful action was continuously repeated everyday

as Mr. Sincavage reported to work in the downgraded position before August 7, 2000 thus the 300 day count moves forward as it resembles a nuisance tort. This point is thoroughly supported on the continuing violation doctrine in which the Ninth Circuit said, "allows courts to consider conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.'" (Quoting Anderson v. Reno, 190 F.3d 930, 936 (9th Cir. 1999)). In the Fifth Circuit in Berry v. Board of Supervisors of L.S.U., 715 F.2d 971 (1983), the Court deemed factors relevant that a Title VII plaintiff may recover for an occurrence outside the limitations period. Utilizing the most important factor of whether the act had a "degree of permanence" that should have put the plaintiff on notice of his claim. 715 F.2d at 981. In this case, the degree of permanence for Mr. Martin's promotional denial was the degree of racial animus it exemplified that was deeply embedded in the Paintshop management structure.

In contrast to Proud v Stone, 945 F.2d 796 (4th Cir. 1991), Mr. Bartow hired Mr. Martin after 21 months as a temporary employee and promoted him February 1998 to staff in Cost Center 1785. Mr. Bartow is guilty of initiating all unlawful practices, which are encompassed in this case. Mr. Bartow testified in an affidavit for summary judgment the primary job functions were to change however that was not the case. (Lodging, p. 2 Section 4) He continued to exemplify his lack of responsibility by creating a hostile work environment

thru the immediate retaliation towards Mr. Martin for inquiring questions about Cost Center 1785 reorganization. (Lodging, p.3) Mr. Martin would still be an employee today if he were not discriminated against in June 1999.

Being officially separated from the organization on April 12, 2000, BMW under the South Carolina Payment of Wage Law 41-10-50 must pay all earned wages within 48 hours or next regular pay period not exceeding 30 days. (Lodging, p.18; Appendix E, APP. 10) Mr. Martin worked on April 5, 2000 from 8:10pm until 5:00 am with a total work time of eight hours and ten minutes that includes a forty-minute non-paid lunch. He was only paid for eight hours. On April 11, 2000, Mr. Martin worked from 7:37 pm to 7:00 am for a total work time of ten hours and forty-three minutes. He was only paid for eight hours and forty-three minutes. (Lodging, p.19) BMW is in direct violation of their own policy as well as state statute by not paying all unused vacation and earned wages in the amount of two hours and fifty-three minutes by May 12, 2000. (Lodging, pp. 19-22)

The South Carolina Department of Wage and Child Labor erred on both counts and was not fined in properly. In accordance to 41-10-80 © the plaintiff may seek in a civil action to recover an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees that are allowed by the court. (Appendix E, p.11) Mr. Martin filed a complaint for the recovery for earned wages owed and

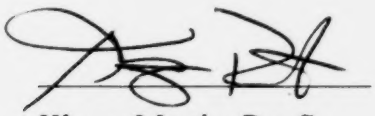
other unlawful employment practices on January 28, 2001 with case number 6:01-0259-25AK in US District Court Greenville Division.

CONCLUSION

In light of the foregoing, the United States Supreme Court should issue a writ of certiorari to the Court of Appeals for the Fourth Circuit and consider petitioner's argument that his discrimination and retaliation claims have merit and were denied by the ruling of the lower courts.

Respectfully submitted,

Dated this 9th day of February, 2003



Khang Martin, Pro Se
5675 Roswell Rd. NE 28C
Atlanta, Ga 30342

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 02-1942

KHANG MARTIN,

Plaintiff – Appellant,

Versus

BMW MANUFACTURING CORPORATION,

Defendant – Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville.
Terry L. Wooten, District Judge. (CA-01-259-6-25AK)

Submitted: November 7, 2002 Decided: November 13, 2002

Before WILKINS and LUTTIG, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Khang Martin, Appellant Pro Se. Robert M. Sneed, George Andrew Harper, JACKSON, LEWIS, SCHNITZLER & KRUPMAN, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Khang Martin seeks to appeal the district court's order dismissing his civil action alleging employment discrimination. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed.

Parties are accorded thirty days after the entry of the district court's final judgment or order to note an appeal, Fed. R. App. P. 4(a) (1) (A), unless the district court extends the appeal period under Fed. R. App. P. 4 (a) (5) or reopens the appeal period under Fed. R. App. P. 4(a) (6). This appeal period is "mandatory and jurisdictional." Browder v. Director, Dep't of Corr., 434 U.S. 257, 264 (1978) (quoting United States v. Robinson, 361 U.S. 220, 229 (1960)).

The district court's order was entered on the docket on July 16, 2002. The notice of appeal was filed on August 16, 2002. Because Martin failed to file a timely notice of appeal or to obtain an extension or reopening of the appeal period, we dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented

in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED

November 27, 2002

No. 02-1942

CA-01-259-6-25AK

KHANG MARTIN

Plaintiff – Appellant

v.

BMW MANUFACTURING CORPORATION

Defendant – Appellee

ORDER

Appellant has filed a motion for extension of time in which to file a petition for rehearing.

The Court denies the motion.

For the Court – By Direction

/s/ Patricia S. Connor

CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED

December 10, 2002

No. 02-1942

CA-01-259-6-25AK

KHANG MARTIN

Plaintiff – Appellant

v.

BMW MANUFACTURING CORPORATION

Defendant – Appellee

ORDER

Appellant has filed an petition for rehearing and rehearing en banc. This Court strictly enforces the time limits for filing petitions for rehearing and rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc as untimely filed.

For the Court – By Direction

/s/ Patricia S. Connor

CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

KHANG MARTIN, Case No.: No. 6:01-0259-25AK

Plaintiff,

vs.

BMW MANUFACTURING CORP.,

Defendant

In this pro se employment discrimination case, the plaintiff alleges that the defendant unlawfully discriminated against him on account of his race. Specifically the plaintiff alleges that the defendant unlawfully: denied him a transfer to "A-shift;" denied him both a promotion to another position and training opportunities; "double -managed" him; and terminated him because of his race. The defendant has filed a motion for summary judgment. (Doc. #26).

This matter is now before the undersigned for review of the Report and Recommendation ("the Report") filed by United States Magistrate Judge William M Catoe, to whom this case had previously been assigned pursuant to 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2) (D.S.C.). In his Report, Magistrate Judge Catoe recommends that the defendant's motion for summary judgment be granted. Plaintiff has filed objections to the Report.

> In conducting this review, the Court applies the following standard:
>
> The magistrate judge makes only a recommendation to the court, to which any party may file written objections... The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a de novo determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the Report and Recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case, the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F.Supp. 137, 138 (D.S.C. 1992) (citations omitted). In light of this standard, the Court has reviewed, de novo, the Report and the objections thereto. The Court accepts the Report in its entirety and concludes that the plaintiff's objections thereto are without adequate legal justification.

THEREFORE, IT IS HERBY ORDERED that the Report be **ACCEPTED**, plaintiff's objections be

OVERRULED, and the defendants' motion for summary judgment be **GRANTED**. (Doc. #26).

IT IS SO ORDERED.

/s/ Terry L. Wooten

UNITED STATES DISTRICT JUDGE

July 11, 2002

Florence, South Carolina

APPENDIX E

Title 41 - Labor and Employment

CHAPTER 10.

PAYMENT OF WAGES

SECTION 41-10-30. Notification to employees of wages and hours agreed upon; recordkeeping requirements; requirement of itemized statement of gross pay and deductions for each pay period.

(A) Every employer shall notify each employee in writing at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the deductions which will be made from the wages, including payments to insurance programs. The employer has the option of giving written notification by posting the terms conspicuously at or near the place of work. Any changes in these terms must be made in writing at least seven calendar days before they become effective. This section does not apply to wage increases.

(B) Every employer shall keep records of names and addresses of all employees and of wages paid each payday and deductions made for three years.

(C) Every employer shall furnish each employee with an itemized statement showing his gross pay and the deductions made from his wages for each pay period.

SECTION 41-10-40. Medium of payment; deposit of wages to employee's credit; prohibition against deductions in absence of written notice; time and place of payment.

(A) Every employer in the State shall pay all wages due in lawful United States money or by negotiable warrant or check bearing even date with the payday.

(B) An employer may deposit all wages due to the employee's credit at a financial institution which is doing business in the State and is insured by an agency of the federal government. When an employee's wages are paid by deposit at a financial institution, he must be furnished a statement of earnings and withholdings. Any wage deposit plan adopted by an employer shall entitle each employee to at least one withdrawal for each deposit, free of any service charge.

(C) An employer shall not withhold or divert any portion of an employee's wages unless the employer is required or permitted to do so by state or federal law or the employer has given written notification to the employee of the amount and terms of the deductions as required by subsection (A) of Section 41-10-30.

(D) Every employer in the State shall pay all wages due at the time and place designated as required by subsection (A) of Section 41-10-30.

SECTION 41-10-50. Payment of wages due discharged employees. When an employer separates an employee from the payroll for any reason, the employer shall pay all wages due to the employee within forty-eight hours of the time of separation or the next regular payday which may not exceed thirty days.

SECTION 41-10-80. Violations and penalties; civil actions by employees; administrative review of civil penalties.

(A) Any employer who violates the provisions of Section 41-10-30 must be given a written warning by the Director of the Department of Labor, Licensing, and Regulation or his designee for the first offense and must be assessed a civil penalty of not more than one hundred dollars for each subsequent offense.

(B) Any employer who violates the provisions of Section 41-10-40 must be assessed a civil penalty of not more than one hundred dollars for each violation. Each failure to pay constitutes a separate offense.

(C) In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. Any civil action for the recovery of wages must be commenced within three years after the wages become due.

(D) The Director of the Department of Labor, Licensing, and Regulation or his designee shall promulgate regulations to establish a procedure for administrative review of any civil penalty assessed by the commissioner.

02-1538

(2)

No.

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KHANG MARTIN,

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SUPPLEMENTAL APPENDIX

Respectfully submitted,

Khang Martin
5675 Roswell Road 28C
Atlanta, Ga 30342
(404) 303 - 8757

12 pp

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

KHANG MARTIN, Case No.: No. 6:01-0259-25AK

Plaintiff,

vs.

BMW MANUFACTURING CORP.,

Defendant

This matter is before the court on the defendant's motion for summary judgment pursuant to Fed.R.Civ.P.56. In his complaint, the pro se plaintiff alleges racial discrimination and retaliation pursuant to Title VII.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

FACTS PRESENTED

The plaintiff, Khang Martin, an African-American, began working for the defendant BMW Manufacturing Corporation ("BMW") beginning in 1995 through a staffing agency. In December 1996, the plaintiff became a regular full-time employee of BMW as a team assistant in the control room. He was promoted to the position of production control room

staff in the Paint Department in February 1998. He worked the B-shift.

On August 19, 1999, the plaintiff was disciplined for violating BMW's anti-harassment policy. The plaintiff had asked a female coworker inappropriate questions, including whether she knew any "bi-curious" females. In his deposition, the plaintiff admitted he behaved inappropriately (Compl. 8).

In May 1999, an employee in the Paint Department was transferred to another department. The plaintiff expressed "verbal interest" in the position (Compl. 7). The vacant position was downgraded from a coordinator level to a staff position (Martin dep. 112-114). A white employee was given the position and the plaintiff alleges he was told it was because the other employee was the "best fit" (Martin dep. 122). He was also told the new position was not dealing with [his] technical knowledge" (Martin dep. 120). In September 1999, the Paint Department was reorganized. The plaintiff remained on the B shift and asked to be transferred to the A shift. His request was denied. He testified that he was merely speculating that he was denied the position in May 199 and a transfer to the A shift because of his race (Martin dep. 133-134).

In December1999 and January 2000, the regular computer system access of a supervisor and coworker were removed. After an investigation, the Pint Department management concluded the plaintiff was responsible and gave him a third level written warning in late January 2000. A third

level reprimand is the severest form of reprimand at BMW short of termination.

In March 2000, BMW conducted its annual performance evaluations and it was decided that the plaintiff should be terminated on the grounds of his prior misconduct and his lack of improvement in his job performance. The plaintiff was paid for his unused vacation days on May 5th and his unused earned time off on May 19th. Pl. ex. 5.

The plaintiff filed his complaint with the Equal Employment Opportunity Commission ("EEOC") on April 17, 2000, alleging retaliation. He filed this action on January 29, 2001. BMW filed this motion for summary judgment on December 28, 2001. By order of this court filed January 2, 2002, pursuant to *Roseboro v. Garrision*, 528 F. 2d 309 (4th Cir. 1975), the plaintiff was advised of the summary judgment dismissal procedure and the possible consequences if he failed to adequately respond to the motion. The plaintiff filed his response on February 4, 2002.

APPLICABLE LAW

Rule 56© of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

> that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that she is entitled to judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would be affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in her pleadings; rather, he must demonstrate the specific, material facts exist which give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. Anderson, 477 U.S. at 252.

Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. Toss v. communications Satellite Corp., 759 F.2d 355,365 (4th Cir. 1985). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must produce existence of every element essential to his action that he bears the burden of adducing at a trial on the merits.

ANALYSIS

Discrimination Claim

The plaintiff alleges various actions on behalf of BMW were discriminatory. He alleges he was: denied a transfer to the A shift, a promotion to another position, and training; "double-managed;" and eventually terminated because of his race.[1] Initially, the court notes some of the plaintiff's claims are procedurally barred. The plaintiff filed his first charge with EEOC on April 17, 2000, alleging he was denied a promotion and terminated based upon discrimination. Thus, the court must

[1]In his memorandum in response to this motion, the plaintiff contends he was subjected to being continuously "double managed" when a B shift manager was absent and an A shift manager supervised him. It is unclear exactly what adverse action the plaintiff is complaining about. In any event, as discussed herein, this claim is procedurally barred.

first limit the plaintiff's claims to actions occurring after June 12, 1999, or 300 days before he filed the first EEOC charge. *Beall v. Abbott Laboratories*, 130 F.3d 614, 620-21 (4th Cir. 1997). Accordingly, the plaintiff's allegation regarding the denial of a promotion in May 1999 is procedurally barred. Further, the claim regarding the denial of training and being "double-managed" were not raised in the plaintiff's charge to the EEOC and thus are procedurally barred. See *Dennis v. County of Fairfax*, 55 F.3d 151, 156(4th Cir. 1995)("Where...claims raised under Title VII exceed the scope of the EEOC charge and any charges that would naturally have arisen from an investigation thereof, they are procedurally barred.").

As to the plaintiff's allegations regarding his termination, since he has put forth no direct evidence of discrimination, his *prima facie* case is assessed under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To establish a prima facie case of discrimination under McDonnell Douglas, the plaintiff must show (1) he is a member of a protected class; (2) he was qualified for his job and was performing it to his employer's legitimate expectations; (3) in spite of his qualifications and performance, he was fired; and (4) the position remained open to similarly situated qualified applicants after his dismissal. On the prima facie case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse

employment action. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598 (4th Cir. 1999). If the employer meets its burden of production, the presumption of discrimination raised by the *prima facie* case is rebutted and "drops from the case," and the plaintiff bears the ultimate burden of proving that he has been the victim of discrimination. See *St. Mary's hon or Center v. Hicks*, 509 U.S. at 507 (1993).

Assuming the plaintiff can establish a prima facie case, BMW has offered the plaintiff's unsatisfactory job performance and his prior misconduct as its legitimate, non-discriminatory reason for its termination of the plaintiff. The plaintiff contends BMW wrongly found him responsible for the computer access problems which resulted in a third level reprimand in January 2000. However, the plaintiff testified BMW had acted in good faith in believing he had altered the computer system (Moore dep. 166-167). Further, there is no evidence in the record that BMW exhibited any race-based animus towards the pla intiff in its investigation, disciplinary action, and ultimate decision to terminate the plaintiff. Because the plaintiff has failed to produce any evidence that the legitimate reason offered by BMW was pretextual or motivated by discriminatory animus as required by *McDonnell Douglas*, summary judgment should be granted on his discrimination claim.

The plaintiff also alleges he was discriminated against in the denial of his request to transfer to the A shift. To

establish a *prima facie* case, the plaintiff must demonstrate that (1) he belongs to protected class; (2) he was qualified for her job; (3) he suffered an adverse employment action; and (4) he was treated differently from similarly situated employees. Once the *prima facie* case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. See *Burdine*, 450 U.S. at 254. If the employer meets its burden of production, the presumption of discrimination raised by the *prima facie* case is rebutted and "drops from the case," and the plaintiff bears the ultimate burden of proving that he has been the victim of discrimination. See *St. Mary's Honor Center*, 509 U.S. at 507.

BMW contends the denial of a transfer to the A shift is not an adverse employment action and furthermore it contends there were no open positions for which the plaintiff was qualified on the A shift. The denial of a transfer to a position with equal pay, benefits, seniority, and responsibility does not qualify as an adverse employment action. See Boone v. Goldin, 178 F.3d 253, 255-256 (4th Cir. 1999) (holding that reassignment can only support a Title VII claim if the reassignment had "significant detrimental effect"). The plaintiff contends a transfer to the A shift would have given him greater opportunities and allowed him to work on more projects (Moore dep. 104). Whether remaining on the B shift would have a significant detrimental effect on the plaintiff is questionable. However, even assuming the plaintiff can establish a prima

facie, there is no evidence in the record that BMW exhibited any race-based animus towards the plaintiff in denying his transfer. Indeed, the plaintiff testified that he was merely speculating that he was denied a transfer to the A shift because of his race (Martin dep. 133-134). Accordingly, summary judgment should be granted on this discrimination claim.

Retaliation Claim

The plaintiff alleges BMW retaliated against him for filing the complaints with the EEOC by with holding pay he was due for unused vacation and earned time.[2] In analyzing retaliation claims under Title VII, where there is no direct evidence of discrimination, the burden-shifting scheme set forth in *McDonnell Douglas* applies. See *Smith v. First Union Nat'l Bank*, 202 F.3d 234,248 (4th Cir. 2000). To establish a prima facie claim for retaliation, the plaintiff must prove (1) he engaged in a protected activity. See *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998). If the plaintiff establishes a prima facie case, the burden shifts to BMW to produce evidence of a legitimate, non-discriminatory reason for the adverse action.

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[2]BMW contends the plaintiff has abandoned his retaliation claim because he admitted in his deposition that he had been paid all monies due him and stated that he did not believe BMW was "stalling" in retaliation. Def. mem. 26. However, in his memorandum in response to the summary judgment motion, the plaintiff stated he still had "an outstanding issue" because BMW did not pay him in a timely manner. Because the plaintiff argues he has not abandoned this issue and out of an abundance of caution, the court declines to find this issue has been abandoned.

See *Burdine*, 450 U.S. at 254. If BMW meets this burden, the plaintiff must show that the proffered reason was pretextual or that the adverse action was motivated by discrimination. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-48 (2000).

In his deposition, the plaintiff testified that the pay issue was just a "misunderstanding" and that he had received all monies due him[3] (Moore dep.230). In his memorandum, the plaintiff contends BMW did not pay him at the proper time in retaliation for his filing a complaint with the EEOC (Pl. mem.10). BMW contends its policy is to pay terminated employees for their unused vacation days and unused time earned on the regular bi-weekly pay dates following termination. The plaintiff received this compensation on May 5th and May 19th. The plaintiff has not presented any evidence showing BMW's conduct was causally related to the protected activity. Further, assuming the plaintiff could establish a prima facie case, BMW has proffered a legitimate, non-discriminatory reason, that it was standard policy, which the plaintiff has failed to show was pretexual. Accordingly, BMW's motion for summary judgment should be granted on this claim.

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[3] Further, the plaintiff testified that the Wage and Labor Commission had investigated the incident and concluded that the plaintiff had been paid all that was due to him (Moore dep. 230)

CONCLUSION AND RECOMMENDATION

Based on the foregoing, it is recommended that the defendant's motion for summary judgment be granted.[4]

/s/ William M. Catoe

UNITED STATES MAGISTRATE JUDGE

February 15, 2002

Greenville, South Carolina

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[4]If the recommendation contained herein is adopted by the District Court, the pending motion to compel will become moot.